



Department of Energy
Acquisition Regulation

No. AL 2010-04
Date 03/01/10

Department of Energy
Financial Assistance Regulations

No. FAL 2010-04
Date 03/01/10

ACQUISITION/FINANCIAL ASSISTANCE LETTER

This Acquisition/Financial Assistance Letter is issued under the authority of the DOE and NNSA Senior Procurement Executives.

Subject: Congressional Notification of Pending Contract or Financial Assistance
Actions in excess of \$1 Million

References:

Energy and Water Development and Related Agencies Appropriations Act, 2010
Pub.L. 111-85, Title III, section 311

Acquisition Guide, Chapter 5.1, Release of Information: Congressional Notification and Long-range Acquisition Estimates

When is this Acquisition Letter (AL)/Financial Assistance Letter (FAL) Effective?

The statutory provision addressed in this AL/FAL is effective as of the date of the enactment of the Energy and Water Development and Related Agencies Appropriations Act, 2010 which is October 28, 2009.

When does the AL/FAL Expire?

This AL/FAL remains in effect until superseded or canceled.

Who are the Points of Contact?

For Department of Energy (DOE) acquisition questions, contact Barbara Binney at (202) 287-1340 or Barbara.binney@hq.doe.gov.

For DOE financial assistance questions, contact Jacqueline Kniskern at (202) 287-1342 or jacqueline.kniskern@hq.doe.gov.

For National Nuclear Security Administration (NNSA) acquisition and financial assistance questions, contact Scott Clemons, at (202) 586-4937 or scott.clemons@nnsa.doe.gov.

For additional information on Acquisition Letters and other issues, visit our website at http://www.management.energy.gov/policy_guidance/procurement_acquisition.htm.

What is the purpose of this AL/FAL?

The purpose of this AL/FAL is to provide information and guidance on statutory and non-statutory requirements for Congressional notification of:

- (a) pending award of a contract action in excess of \$1 million;
- (b) announcement of selected applications for negotiation of financial assistance awards in excess of \$1 million; and
- (c) award of a financial assistance action in excess of \$1 million.

The AL/FAL prescribes instruction and guidance pertaining to the statutory Congressional notification required by Section 311 of the Energy and Water Development and Related Agencies Appropriations Act, 2010 (Pub. L. 111-85). In addition, this AL/FAL addresses a non-statutory Congressional notification for actions funded under the American Recovery and Reinvestment Act of 2009 (ARRA).

What is the background?

This AL/FAL implements Section 311 of Pub. L. 111-85, which requires the Department to provide Congressional notice for actions described in Section 311 that are in excess of \$1 million.

The following is the text of Section 311:

None of the funds made available by this Act may be used to make a grant allocation, discretionary grant award, discretionary contract award, Other Transaction Agreement, or to issue a letter of intent totaling in excess of \$1,000,000, or to announce publicly the intention to make such an award, including a contract covered by the Federal Acquisition Regulation, unless the Secretary of Energy notifies the Committees on Appropriations of the Senate and the House of Representatives at least 3 full business days in advance of making such an award or issuing such a letter: Provided, That if the Secretary of the Department of Energy determines that compliance with this section would pose a substantial risk to human life, health, or safety, an award may be made without notification and the Committees on Appropriations of the Senate and the House of Representatives shall be notified not later than 5 full business days after such an award is made or letter issued

This Section 311 notice requirement is in addition to preexisting DOE procedures for Congressional notifications of contract and financial assistance actions (see Acquisition Guide, Chapter 5.1, Release of Information: Congressional Notification and Long-range Acquisition Estimates).

Section 311 does not apply to actions that are funded under the ARRA. However, with the significant Congressional interest in ARRA funded actions, the Department has determined, as a matter of policy, that notices of pending acquisition and assistance actions using ARRA funds will also be provided to Congress. Please refer to Section G. of this AL/FAL for information and guidance regarding ARRA notices.

What are the instructions/guidance of this Acquisition and Financial Assistance Letter?

A. Applicability

The Section 311 statutory notification applies only to actions described in Section 311 and paragraphs B., C., and D. of this AL/FAL, that are valued in excess of \$1 million, under which funds are made available from Pub.L. 111-85.

B. Terms and Definitions

"Announce publicly," as used in this AL/FAL, means the sharing of information in any form of communication with a non-DOE party. This includes press releases, award notices posted to FedBizOpps, apparently successful notices in small business set-asides, and successful/unsuccessful offeror notification letters. For block or formula grant programs, public announcement means the posting of the Funding Opportunity Announcement and the annual Program Notice. Prospective awardees or applicants who have been selected for negotiation of financial assistance awards must not be notified in advance to the completion of the Section 311 notification requirements or DOE policy to implement like processes as described in this AL/FAL.

"Discretionary contract award," as used in Section 311, means all types of commitments that obligate the Government to an expenditure of funds that are made available under Pub.L. 111-85, including but not limited to, contract awards; purchase orders; task and delivery orders under multiple award contracts to include Governmentwide acquisition contracts, indefinite delivery contracts, and Federal Supply Schedule contracts; orders/calls under basic order agreements and blanket purchase agreements; and letter contracts. For Power Marketing Administrations, except for Bonneville Power Marketing Administration, this includes purchase power and wheeling transactions.

"Discretionary grant award," as used in Section 311, is an award of financial assistance, other than a grant allocation.

"Grant allocation," as used in Section 311, means a block or formula grant.

"Other Transaction Agreement," as used in Section 311, means "Technology Investment Agreement" codified in Federal regulation at 10 C.F.R. Part 603, pursuant to DOE's Other Transaction Authority of 42 U.S.C. § 7256.

"Procurement Director," as used in this AL/FAL, means for DOE the Field Contracting Office Procurement Director and for NNSA the NNSA Service Center Head of the Contracting Activity

(HCA). For Power Marketing Administrations, except for Bonneville Power Marketing Administration, the definition includes the Field Office Power Marketing or Energy Marketing and Management Director/Manager for other than FAR-based contract actions.

"Three full business days," as used in Section 311, means three consecutive days, excluding Saturdays, Sundays, and Holidays, beginning at 8:30 a.m. eastern time on the first business day and ending at 5:30 p.m. eastern time on the third business day.

"Totaling in excess of \$1,000,000," as used in Section 311, for contract actions, non-competitive financial assistance awards, Other Transactions Agreements and Office of Science's annual notices means the total value of the award including options, budget periods and cost share. For competitive financial assistance actions, it means the total value of the award, including cost share.

Note: DOE does not commonly use "letters of intent." In some instances, this term has been used to mean a letter contract. At other times Departments (such as Transportation) have received specific statutory direction to use "letters of intent" to announce an intention to obligate an amount from future available budget authority specified in law, with certain limitations, for defined major capital projects. DOE has not received similar statutory direction regarding "letters of intent" and it is not anticipated that a contracting officer would have need for one. Should circumstances arise where a contracting officer believes it would need to use a letter of intent, please contact the appropriate person under the points of contact section of this AUFAL prior to use.

C. Section 311 Discretionary Contract Awards

1. Congressional notification is required for discretionary contract awards (see definition in Section B. of this AL/FAL) with a total value, including all options, in excess of \$1 million. Purchase power and wheeling transactions will use a modified instruction for preparation and submission of notices. The modified instruction will be issued separately from this AL/FAL to the Power Marketing Administration.
2. Congressional notification is also required for a non-competitive extension of a contract that requires a Justification for Other Than Full and Open Competition (JOFOC), or other action that requires a JOFOC (e.g., new scope modification) pursuant to Federal Acquisition Regulation (FAR) Part 6, under either an existing contract or a new contract, when the value of the action is expected to exceed \$1 million. When a synopsis must be issued prior to award, the contracting officer should first consider responses to the synopsis prior to sending the required Congressional notification.
3. For small business programs, the pre-award notices to unsuccessful offerors required by FAR 15.503(a)(2), should not be provided until after the Congressional notification is made and the required three full business days have elapsed.
4. The notification requirement does not apply to the following:

- (a) Modifications that are within the scope and subject to the terms and conditions of an existing contract, including modifications that are issued pursuant to the Changes clause of the contract, and administrative modifications (e.g., funding modification).
 - (b) The exercise of existing options that are contained in the contract.
 - (c) The issuance of a task and delivery order awarded under a DOE single award indefinite delivery contract.
 - (d) Contract actions, including orders, which are awarded using another agency's funds.
5. The appropriate Congressional notification shall be provided in accordance with the procedures prescribed in Section E. of this AL/FAL.

D. Section 311 Financial Assistance and Other Transactions

1. **Competitive Discretionary Grant Award:** Congressional notification is required prior to announcement of a selection of applications for negotiation of financial assistance awards from a Funding Opportunity Announcement when the total amount available for all awards is in excess of \$1 million. The Congressional notification shall be provided in accordance with the procedures prescribed in Section E. of this AL/FAL. Congressional notification is not required for subsequent award(s) made pursuant to the selection for which Congressional notification has already been provided.
2. **Grant Allocations (block and formula grants):** Congressional notification shall be provided in advance of announcing publicly the funding opportunity announcement and the annual program notice. The Congressional notification shall be provided in accordance with the procedures prescribed in Section E. of this AL/FAL. Congressional notification is not required for subsequent award(s) made pursuant to the selection for which Congressional notification has already been provided.
3. **Office of Science's Annual Funding Opportunity Notices:** Congressional notification shall be provided on those awards exceeding \$1 million after selection but prior to award. The Congressional notification shall be provided in accordance with the procedures prescribed in Section E. of this AL/FAL.
4. **Non-competitive Discretionary Financial Assistance:** Congressional notification is required prior to award of a non-competitive, discretionary, grant, cooperative agreement or Other Transaction Agreement that is valued in excess of \$1 million in accordance with the procedures prescribed in Section E. of this AL/FAL. This includes all awards for congressionally directed projects.

E. Procedures for Submission of Section 311 Congressional Notifications

1. In accordance with Sections C. and D. above, for actions that are valued in excess of \$1 million and obligate FY-2010 appropriations under Pub.L. 111-85, at least ten (10) days

prior to making award (see E.2.(a) for details), the Field Contracting Office Procurement Director, or designee, shall provide the required draft notice using the appropriate form.

Note: *If the action will include both ARRA and FY-2010 appropriations under Pub.L. 111-85, use the statutory notification form.* The Field Contracting Office shall prepare the appropriate form letter in draft for the Director, Office of Procurement and Assistance Management signature. It is important to spell out all abbreviations and acronyms. The model form letters are as follows:

- Attachment 1 form letter, Subject: Section 311 Notification of Pending Contract Action
- Attachment 2 version A form letter, Subject: Section 311 Notification of Pending Public Announcement of Selection of Applications for Negotiation of Financial Assistance Awards
- Attachment 3 version B form letter, Subject: Section 311 Notification to Make a Non-competitive Financial Assistance Award.

When the action is ready for award or public announcement, the Procurement Director, or designee, shall:

- (a) Draft the notice, give the notice file name a specific title to include office name, provide the names of the people within the contracting activity who should receive a copy of the notice when it is sent to Congress, and encrypt (i.e., Entrust) the e-mail and send to the Office of Procurement and Assistance Management (OPAM) at: 311Notice@hq.doe.gov.
- (b) The subject line of the email transmitting the notice to OPAM shall be as follows: State (1) it is a Draft Section 311 notice, (2) whether it is a contract or financial assistance action, (3) the contracting office name, and (4) the title of the contract or Funding Opportunity Announcement identified in the letter; (example of e-mail subject line follows: "Subject: Draft 311 notice - contract action - NETL - title").

The Procurement Director is responsible for ensuring the accountability, accuracy, and timeliness of the notification process. This includes ensuring the following:

- Completion of all local reviews, concurrences and approvals before sending the draft notice;
- Implementation of sufficient local procedures to ensure compliance with this AL/FAL;
- Retention of copies of all Congressional notification submissions for the official transaction file; and
- Conducting periodic local pre- and post-submission quality assurance to ensure that all required notices are or have been submitted.

The notification shall provide information prescribed in the attached model form letters including, as applicable:

- (a) For contract actions, provide the name of the DOE Office that the action supports, contract short description, contract number, contractor name with city and state, and the dollar value of award to include options.
 - (b) For competitive financial assistance actions or Other Transaction Agreements, provide the name of the DOE Office that the action supports, short description of financial assistance effort identify number(s), e.g. DE-FOA-xxxxx or award number, the selectee name(s) with city and state, include published estimated dollar value available for the award. *(If there are more than a few selectees to list, then the list can be an enclosure to the letter. For an Office of Science 10 CFR 605 award, edit the letter to show it is for financial assistance awards instead of selection of applicants.)*
 - (c) For non-competitive financial assistance actions or Other Transaction Agreements, provide the name of the DOE Office that this action supports, title of the financial assistance effort, and the award number, name of the firm with city and state, and include dollar value including cost share.
- 5. No public announcement of a selection (per Section D. of this AL/FAL), or award (per Sections C. and D. of this AL/FAL) shall be made by the Selection Official and/or the contracting officer prior to the passage of three (3) full business days after the date in which e-mail confirmation is received by the Procurement Director, or designee, that the required notice has been submitted to Congress by OPAM.
 - 6. The Procurement Director shall ensure that the Selection Official is fully cognizant that no public announcement of selection or award may be made prior to confirmation that the required notice has been sent to Congress and that the requisite timeframe has elapsed.

F. Secretarial Determinations of Substantial Risk to Human Life, Health, or Safety

- 1. When compliance with the three (3) full business day advance notice requirement of Section 311 would pose a substantial risk to human life, health, or safety, an award may be made without such advance notification to the Committees on Appropriations of the Senate and the House of Representatives if the Secretary determines in advance to the action that any one of these conditions exists.
- 2. If an award must be made pursuant to this authority, the Procurement Director, in coordination with the cognizant program official(s) and legal counsel, shall develop a written recommendation supporting the action for approval by the Secretary.
- 3. The Procurement Director shall coordinate through the Head of the Contracting Activity with the Head of the Program Element for obtaining necessary approval by the Secretary.
- 4. An award subject to the requirements of Section 311 shall not be made in advance of the Secretary's determination.

5. Upon approval by the Secretary, notification of the action to the Committees on Appropriations of the Senate and the House of Representatives shall be made not later than five (5) full business days after making such award. Follow the procedures at Section E. for preparation and submission of Section 311 Notice, as a separate attachment to the e-mail include a copy of the signed Secretary's determination for OPAM's record.
6. It should be noted that the standard for unusual and compelling urgency, as prescribed by FAR 6.302-2, is distinct from the Section 311 exception that authorizes the Secretary to determine that compliance would pose a substantial risk to human life, health, or safety.

Note: If the Secretary delegates the authority to make these determinations, any such delegation will be issued separately from this AL/FAL.

G. Procedures for Submission of ARRA Congressional Notifications

1. The ARRA non-statutory notification applies to actions that are valued in excess of \$1 million, under which funds are made available from the ARRA and the action will be the subject of a press release or other formal media event. Such actions may be identified by HQ officials, (e.g., Recovery Team, Congressional and Intergovernmental Affairs, Public Affairs) or by the program field office.
2. In addition to the procedures described in Section E. above, the following applies to actions described in G. I. above:
 - (a) The Field Contracting Activity shall prepare the draft notice, use Attachment 3 Form Letter, Subject: Notification of Pending Contract Action, or Public Announcement of Selected Applications for Negotiation of Financial Assistance Awards, or Pending Financial Assistance Award(s), or to Make a Non-competitive Financial Assistance Award under the American Recovery and Reinvestment Act. Follow the editing instructions to tailor the letter for a contract action or a competitive or a non-competitive financial assistance action.
 - (b) The notification shall provide summary information including, as applicable. State a short description of effort, if applicable, and as available, identifying number(s), e.g. DE-FOA-xxxxx or state a short description of solicitation, if applicable, and as available identifying number(s), e.g. solicitation number, request for proposal number, request for quotation number, order number, estimated value of award to include options. *For competitive financial assistance actions, include published estimated dollar value available for the award (Do not provide the name of the contractor or firm(s).) (Edit the paragraph to reflect the type of action.)*
 - (c) The Field Contracting Activity, in coordination with the Program Office Recovery Act lead who will coordinate with the DOE Recovery Act Team, shall state, in the e-mail, whether or not DOE will issue a press release or any other media event (public announcement) on this action. If any earlier public announcement was made, state when this announcement occurred.

H. OPAM Responsibilities for Section 311 and ARRA Notices

OPAM will serve as the Department's central point for receipt of all Section 311 electronic Congressional notice submissions from DOE and NNSA field procurement offices.

Accordingly, OPAM will:

1. Maintain and check the central e-mail box (311Notice@hq.doe.gov) twice each business day at 11 a.m. and 3:00 p.m. eastern time for submitted notices.
2. Review each draft notice for accuracy and completeness. Notices containing errors will be revised by OPAM.
3. At least three (3) full business days (see E. for details) in advance of the identified date of selection/award, submit valid Congressional notifications electronically, by e-mail, to designated Congressional Appropriations Committee staff. Courtesy copies will be provided to the submitting Head of the Contracting Activity, the Procurement Director, or designee, and other designated DOE officials.
4. Maintain electronic copies, with backup, of all transmitted Congressional notices.
5. Manage corporate quality assurance processes to ensure compliance (e.g., weekly comparison of awards and announcements in excess of \$1 million against the notices received/submitted to Congress).
6. Implement or supplement, as appropriate, existing procurement and financial assistance management oversight and control processes (e.g., Balanced Scorecard Self-Assessment, Procurement Management Review, and Business Clearance Programs) to ensure proper implementation of and compliance with the requirements of this AL/FAL.